



## **FEDERAL TRADE COMMISSION**

### **16 CFR Part 255**

#### **Guides Concerning the Use of Endorsements and Testimonials in Advertising**

**AGENCY:** Federal Trade Commission.

**ACTION:** Proposed changes to guides; request for comments.

**SUMMARY:** The Federal Trade Commission (“FTC” or “Commission”) is seeking public comment on proposed revisions to its Guides Concerning the Use of Endorsements and Testimonials in Advertising (“the Guides”).

**DATES:** Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

**ADDRESSES:** Interested parties may file a comment online or on paper by following the instructions in the Invitation to Comment part of the **SUPPLEMENTARY**

**INFORMATION** section below. Write “Endorsement Guides; P204500” on your comment and file your comment online at <https://www.regulations.gov>. If you prefer to file your comment on paper, mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580.

**FOR FURTHER INFORMATION CONTACT:** Michael Ostheimer (202-326-2699), [mostheimer@ftc.gov](mailto:mostheimer@ftc.gov), Attorney, Division of Advertising Practices, Bureau of Consumer Protection, Federal Trade Commission, Room CC-10603, 600 Pennsylvania Avenue NW, Washington, DC 20580.

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#### **I. OVERVIEW OF THE CURRENT GUIDES**

The Guides, 16 CFR part 255, are designed to assist businesses and others in conforming their endorsement and testimonial advertising practices to the requirements of section 5 of the FTC Act. Although the Guides interpret laws administered by the Commission, and thus are advisory in nature, proceedings to enforce the requirements of law as explained in the Guides can be brought under the FTC Act. In any such proceeding, the Commission would have the burden of proving that a particular use of an endorsement or testimonial was deceptive under the law.

The Guides define both endorsements and testimonials broadly to mean any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. 16 CFR 255.0(b) and (c). The Guides state that endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. 16 CFR 255.1(a). Furthermore, endorsements may not contain any representations that would be deceptive, or could not be substantiated, if made directly by the advertiser. *Id.* The Guides state that an advertisement presenting consumer endorsements about the performance of an advertised product will be interpreted as representing that the product is effective for the purpose depicted in the advertisement. 16 CFR 255.2(a). They further advise that an advertisement employing a consumer endorsement on a central or key attribute of a product will be interpreted as representing that the endorser's experience is representative of what consumers will

generally achieve. 16 CFR 255.2(b). If an advertiser does not have adequate substantiation that the endorser's experience is representative, the advertisement should clearly and conspicuously disclose what the generally expected performance would be in the depicted circumstances. *Id.*

The Guides define an expert endorser as someone who, as a result of experience, study, or training, possesses knowledge of a particular subject that is superior to that generally acquired by ordinary individuals. 16 CFR 255.0(e). An expert endorser's qualifications must in fact, give him or her the expertise that he or she is represented as possessing with respect to the endorsement. 16 CFR 255.3(a). Moreover, an expert endorsement must be supported by an actual exercise of that expertise and the expert's evaluation of the product must have been at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented. 16 CFR 255.3(b).

The Guides advise that when there is a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed. 16 CFR 255.5.

Among other things, the Guides also state that: (1) when the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given, 16 CFR 255.1(c); (2) advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers; and endorsers also may be liable for statements made in the course of their endorsements, 16 CFR 255.1(d); (3) advertisements presenting endorsements by what are represented to be "actual consumers" should utilize actual consumers, or clearly and conspicuously disclose that the persons are not actual consumers, 16 CFR 255.2(c); and (4) an organization's

endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. 16 CFR 255.4.

## **II. HISTORY OF THE GUIDES**

In December 1972, the Commission published for public comment proposed Guides Concerning the Use of Endorsements and Testimonials in Advertising, 37 FR 25548 (Dec. 1, 1972). Interested parties submitted extensive comment. On May 21, 1975, the Commission promulgated, under the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. 41–58, three sections of the 1972 proposal as final guidelines (16 CFR 255.0, 255.3 and 255.4) and republished three others, in modified form, for additional public comment. 40 FR 22127 (May 21, 1975). The Commission received public comment on the three re-proposed guidelines, as well as on one of the final guidelines. On January 18, 1980, the Commission promulgated three new sections as final guidelines (16 CFR 255.1, 255.2 and 255.5) and modified an example to one of the final guidelines adopted in May 1975 (16 CFR 255.0 Example 4). 45 FR 3870 (Jan. 18, 1980).

As part of its periodic regulatory review, the Commission sought public comment on the Endorsement Guides in January 2007. 72 FR 2214 (Jan. 18, 2007). In November 2008, the Commission discussed the comments it received in 2007, proposed certain revisions to the Guides, and requested comment on those proposed revisions. 73 FR 72374 (Nov. 28, 2008). In October 2009, the Commission substantively amended the Guides, adding what are now 16 CFR 255.0(a), 255.1(d) and 255.2(a), significantly modifying the guidance in 16 CFR 255.0(b), and modifying or adding numerous examples. 74 FR 53124 (Oct. 15, 2009).

In February 2020, again as part of its ongoing regulatory review process, the Commission published a Federal Register notice seeking comment on the overall costs, benefits, and regulatory and economic impact of the Guides as well as a number of specific questions focused on the material connections section of the Guides (16 CFR

255.5). 85 FR 10104 (Feb. 21, 2020). In light of the disruption caused by the Coronavirus pandemic, the Commission extended the comment period for two months. 85 FR 19709 (Apr. 8, 2020).

### **III. OVERVIEW OF COMMENTS RECEIVED IN RESPONSE TO REGULATORY REVIEW NOTICE**

The Commission received 108 unique substantive comments in response to its regulatory review notice.<sup>1</sup> Having considered those comments and its own extensive consumer protection experience, the Commission now proposes various amendments to the Guides and invites comments on these proposed changes.

Most commenters noted that the Guides are beneficial and should be retained,<sup>2</sup> and none disagreed. Some comments praised the current Guides for striking an appropriate balance between protecting consumers and allowing advertisers to communicate creatively and effectively to potential customers.<sup>3</sup>

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<sup>1</sup> Approximately seventy-five comments were submitted by individual consumers, most of whom were apparently university students fulfilling class assignments. The remaining commenters were: American Influencer Council, Inc. (“AIC”); American Financial Services Association (“AFSA”); Amazon.com, Inc. (“Amazon”); Association of National Advertisers (“ANA”); BBB National Programs (“BBB”); Shirley Boyd, Esq. (“Boyd”); Campaign for a Commercial Free-Childhood and Center for Digital Democracy (“CCFC”); Competition and Markets Authority (“CMA”); Consumer Reports; Council for Responsible Nutrition (“CRN”); Common Sense Media (“CSM”); Consumer World (“CW”); Digital Content Next (“DCN”); Esports Bar Association (“Esports Bar”); Entertainment Software Association (“ESA”); Prof. Chris Jay Hoofnagle (“Hoofnagle”); Interactive Advertising Bureau (“IAB”); Jim Dudukovich, Esq. (“Dudukovich”); IZEA Worldwide, Inc. (“IZEA”); Kleinfeld, Kaplan and Becker LLP (“KK&B”); LEGO Group (“LEGO”); Maastricht University (“Maastricht”); Association of Magazine Media (“MPA”); North American Insulation Manufacturers Association (“NAIMA”); Internet and Television Association (“NCTA”); NetChoice; News Media Alliance (“NMA”); National Retail Federation (“NRF”); Performance-Driven Marketing Institute (“PDMI”); Pharmavite LLC (“Pharmavite”); Performance Marketing Association (“PMA”); Princeton University Center for Information Technology Policy and University of Chicago Department of Computer Science researchers (“Princeton”); SuperAwesome; and Truth in Advertising, Inc. (“TINA”). The comments are available online at <https://beta.regulations.gov/document/FTC-2020-0017-0001/comment>.

<sup>2</sup> See, e.g., Amazon at 3; ANA at 1-3; BBB at 2; CRN at 1; DCN at 1; Dudukovich at 3; Esports Bar at 2-3; ESA at 2; IAB at 1-2; IZEA at 1; LEGO at 1; MPA at 2; NAIMA at 1-2; NCTA at 1-2; NMA at 2; and Pharmavite at 1.

<sup>3</sup> See, e.g., Amazon at 3; ESA at 2; IAB at 2-3; MPA at 2; NCTA at 1-2; and PDMI at 2.

Most comments responded to specific questions the Commission posed in the February 2020 Federal Register notice about certain provisions of the current Guides. Those comments are discussed in Part IV, below, in the context of the specific Guide provisions to which they relate.

In addition, some comments addressed other issues. For example, some commenters said that the Commission should engage in more vigorous enforcement activities related to the Guides<sup>4</sup> and greater educational efforts.<sup>5</sup> Other commenters weighed in on whether the Commission should<sup>6</sup> or should not<sup>7</sup> engage in a rulemaking proceeding to convert some principles in the Guides into trade regulation rules.

Some comments urged the Commission to encourage social media platforms to improve or standardize the built-in tools that some of them offer to facilitate disclosures of material connections by platform users.<sup>8</sup> The Commission supports development of effective, built-in disclosure tools but is concerned that some of the existing ones are too poorly contrasting, fleeting, or small, or may be placed in locations where they do not catch the user's attention. For example, a social media disclosure tool that superimposes a disclosure over a posted picture could be poorly contrasting, making the disclosure inadequate, especially if the picture is only displayed for a few seconds and contains competing text or other information. Similarly, a disclosure tool that superimposes a small disclosure in the bottom left corner of a video for only a few seconds is inconspicuous. Even a tool that employs a disclosure of sufficient size, duration, and contrast could be inadequate if it is displayed above, rather than below, a picture or video that catches the attention of users scrolling through their feeds. Platforms may be

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<sup>4</sup> See, e.g., Boyd at 5-6, 16; Consumer Reports at 2; IZEA at 1; NRF at 14; and TINA at 22-23.

<sup>5</sup> See, e.g., AIC at 4-5; Amazon at 3; Dudukovich at 6; and IAB at 3.

<sup>6</sup> See, e.g., Boyd at 5-7; Natalie Jacobwith at 3.

<sup>7</sup> See, e.g., MPA at 4, 7-8; and NRF at 14.

<sup>8</sup> See, e.g., AFSA at 2; AIC at 2-3; ANA at 5-6; Dudukovich at 11-12; IAB at 4; NCTA at 9; NRF at 9; PMA at 2; and Princeton at 5; *see also* CMA at 3.

exposing endorsers to liability if users rely solely on a platform's inadequate tools for their disclosures. Platforms may also be exposing themselves to liability depending on the representations they make about these tools. Given that platforms play a major role in disseminating and monetizing endorsements, and actively encourage endorsers to promote and amplify their posts, the Commission believes they should carefully evaluate their tools and what they say about them to ensure they are not exposing themselves or their users to liability.

#### **IV. SECTION-BY-SECTION DISCUSSION OF PROPOSED REVISIONS TO GUIDES, COMMENTS RECEIVED IN RESPONSE TO FEBRUARY 2020 FEDERAL REGISTER NOTICE, AND REQUESTS FOR ADDITIONAL COMMENT**

The Commission believes the Guides should be retained but a number of revisions are appropriate. Many of the proposed changes are simply clarifications or additional examples of the principles embodied in the existing Guides. Others enunciate basic principles not expressly set forth in the current Guides but are established in Commission enforcement actions. Several represent substantive changes from the current Guides, based upon increased knowledge of how consumers view endorsements and taking into consideration the comments submitted in response to the February 2020 Federal Register notice. Some of the new examples and updates to existing examples reflect the extent to which advertisers have turned increasingly to the use of social media and product reviews to market their products.

The Commission seeks comments on these proposed revisions, which are discussed below by Section.<sup>9</sup>

##### **A. § 255.0 – Purpose and Definitions**

The Guides currently begin with a purpose and definitions section.

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<sup>9</sup> Non-substantive changes to improve readability or to update examples to reflect changes in marketing methods, technology, or society that have occurred since the Guides were last updated or since they were first written (e.g., replacing “brochure” with “web page”) are not discussed below.

Current § 255.0(b) defines an “endorsement” as any advertising message that consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. As suggested in a comment, the Commission proposes revising that definition to clarify that “marketing” and “promotional” messages can be endorsements.<sup>10</sup> When a social media user tags a brand in a post, it generally communicates that the poster uses or likes the brand, so, the revised definition would also indicate that tags in social media posts can be endorsements. Section 255.0(b) also currently states that an “endorser” may be an individual, group, or institution. The Commission proposes a modification indicating that an endorser could instead simply appear to be an individual, group, or institution. Thus, the Guides would clearly apply to endorsements by fabricated endorsers.

The Commission proposes to add a footnote to § 255.0(b). It would indicate the availability of detailed staff business guidance regarding endorsements that is updated periodically, while noting that such staff guidance is not approved by or binding upon the Commission. Numerous commenters asked the Commission to update the Guides more frequently, such as every three years.<sup>11</sup> Some commenters asked that the Commission provide detailed guidance in the Guides about acceptable and unacceptable language and placement for disclosures of material connections and their use on particular platforms,<sup>12</sup> while others asked the Commission to continue to allow marketers flexibility in the crafting and placement of necessary disclosures.<sup>13</sup> Commenters also differed on whether to incorporate FTC staff business guidance into the Guides, with some saying it would be useful<sup>14</sup> and others taking the position that the social media landscape is ever-changing

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<sup>10</sup> See Boyd at 7.

<sup>11</sup> See, e.g., AIC at 1, 3; and Pharmavite at 2.

<sup>12</sup> See, e.g., CRN at 2-4; Pharmavite at 1-2; PMA at 2; and Anna Keltner at 3.

<sup>13</sup> See, e.g., ESA at 5-6; IAB at 2-3; and MPA at 6-7.

<sup>14</sup> See, e.g., Consumer Reports at 9; CRN at 2; Dudukovich at 9; Pharmavite at 1-2; and TINA at 12.



and the Guides should focus on general principles.<sup>15</sup> One commenter suggested cross-referencing staff guidance in the Guides.<sup>16</sup> The Commission believes that its current approach for endorsement-related guidance makes sense, with the Guides focused on general principles and examples, and the more informal and easily updated staff guidance focused on specific questions and issues that arise in this area. The new footnote would ensure that people reading the Guides are aware of this additional staff guidance.

Current § 255.0(d) defines a “product” as any product, service, company or industry. At the suggestion of a commenter,<sup>17</sup> the Commission proposes modifying the definition to clarify that a “product” includes a “brand.”

In response to comments requesting further guidance on what constitutes a clear and conspicuous disclosure, the Commission proposes adding a new definition of “clear and conspicuous” in a new § 255.0(f). It would define a “clear and conspicuous” disclosure as a disclosure that “is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers.” It would give specific guidance with respect to visual and audible disclosures, stress the importance of “unavoidability” when the communication involves social media or the Internet, and say that the disclosure should not be contradicted or mitigated by, or inconsistent with, anything in the communication. While not mandating that a disclosure be both visual and audible under all circumstances, it would say that when the triggering claim is visual the disclosure should be at least visual; that when the triggering claim is audible, the disclosure should be at least audible; that when the triggering claim is both visual and audible, the disclosure should be both; and that a simultaneous audible and visual disclosure is more likely to be clear and conspicuous. Finally, the proposed definition notes that when an endorsement targets a

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<sup>15</sup> See, e.g., ANA at 3; BBB at 3; and NCTA at 2.

<sup>16</sup> See TINA at 12.

<sup>17</sup> See Boyd at 7.

specific audience, such as older adults, its effectiveness will be evaluated from the perspective of members of that group.

Example 1 to § 255.0 currently provides an example of an endorsement and illustrates the principle that an endorsement may not be presented out of context or reworded so as to distort the endorser's opinion. One commenter noted that it was unclear in the example who distorted the endorser's opinion.<sup>18</sup> The Commission proposes to modify the example to clearly identify the responsible party.

Current Example 5 to § 255.0 involves a television advertisement in which a professional golfer implicitly endorses a brand of golf balls by being shown practicing her swing using the balls, even though she says nothing in the ad. The Commission proposes expanding this example to illustrate that use of the same video footage in a social media post can be an endorsement as long as the endorsed brand is tagged or otherwise readily identifiable by viewers.

Example 6 to § 255.0 currently illustrates how a paid actor hosting a product infomercial and reading from a script can still be making an endorsement. The Commission proposes adding a scenario to this example to show how the same actor can talk about the product without making an endorsement and deleting Example 7, which had also focused on illustrating statements that were not endorsements.

Example 8 to § 255.0, which would be renumbered as Example 7, currently provides scenarios in which an individual consumer's social media posts would and would not be considered endorsements. Two commenters asked for further explanation of the Commission's reasoning.<sup>19</sup> The Commission proposes to clarify the example. When a consumer buys the product with her own money under ordinary circumstances and chooses to post about it, the post is not an endorsement under the Guides because the

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<sup>18</sup> See Dudukovich at 17.

<sup>19</sup> See ANA at 8-9; and Dudukovich at 17-18.

consumer has no connection to the manufacturer beyond being an ordinary purchaser and her message cannot be attributed to the product's manufacturer. The revised example would note that the same would be true for a consumer review. Furthermore, if the consumer received a coupon for a free trial product from the manufacturer simply based upon her purchase history and if the manufacturer did not ask coupon recipients for reviews, then the consumer's unsolicited review would not be an endorsement because it cannot be attributed to the manufacturer. However, if the consumer received the free product as part of a marketing program that periodically provides free products from various manufacturers, where the consumer has the option of writing a review, the consumer's review would be an endorsement because of her connection to the manufacturer through the marketing program.

The Commission proposes adding six new examples to this section. New Example 8 would illustrate an endorsement made through video game play streamed on social media without an express product recommendation. New Example 9 illustrates disclosures that are easily missed and thus are not clear and conspicuous. New Examples 10 and 11 illustrate how a disclosure may need to be evaluated from the perspective of an advertisement's target audience and that disclosures need to be clear and conspicuous on multiple common types of platforms or devices.

New Example 12 derives in part from a commenter's suggestion that the Guides address an incentivized endorser denigrating a competitor's product.<sup>20</sup> The example would state that a fake negative review or another paid or incentivized negative statement about a competitor's service does not meet the definition of an "endorsement." It would note, however, that engaging in such disparagement can be a deceptive practice.

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<sup>20</sup> See NAIMA at 5; *see also* Consumer Reports at 4.

**New Example 13 derives from a commenter’s suggestion that the Guides state, as alleged in *FTC v. Devumi, LLC*,<sup>21</sup> that it is illegal to sell, purchase, or use bots or other fake social media accounts to market goods and services.<sup>22</sup>** Because such indicators do not express an advertising message by their mere presence, the example would acknowledge that an endorser’s use of fake indicators of social media influence is not itself an endorsement issue. The Commission would note in the example that it is a deceptive practice for users of social media to purchase or create indicators of social media influence and then use them to misrepresent their influence for a commercial purpose and that it is a deceptive practice to sell or distribute such indicators to such users.

**B. § 255.1 – General Considerations**

Section 255.1 sets forth principles that apply to endorsements generally (*e.g.*, endorsements must reflect the honest opinions or experience of the endorser, and they may not convey any representation that would be deceptive if made directly by the advertiser).

Section 255.1(d) currently recognizes that advertisers are subject to liability for false or unsubstantiated statements made through endorsements, or for failing to disclose material connections between themselves and their endorsers. The Commission would indicate that an advertiser may be liable for an endorser’s deceptive statement even when the endorser is not liable. The Commission also proposes adding guidance to this subsection on what actions advertisers should take with respect to their endorsers. Such guidance previously only appeared in an example.

Current § 255.1(d) also recognizes that endorsers themselves may be subject to liability for their statements. Commenters asked for clarification of when endorsers

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<sup>21</sup> See Complaint at 5, *FTC v. Devumi, LLC*, No. 9:19-cv-81419-RKA (S.D. Fla. Oct. 18, 2019), [https://www.ftc.gov/system/files/documents/cases/devumi\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/devumi_complaint.pdf).

<sup>22</sup> See Consumer Reports at 9.

would be liable.<sup>23</sup> The Commission proposes moving the discussion of endorser liability to a new § 255.1(e) and indicating that endorsers may be liable for their statements such as when they make representations that they know or should know to be deceptive. The level of due diligence required by the endorsers will depend on their level of expertise and knowledge, among other factors. Current Examples 3 and 4 involve endorsers who knew or should have known that their statements were deceptive. Section 255.1(e) would also say that a non-expert endorser may also be liable when the endorser makes misleading or unsubstantiated representations about performance or efficacy that are inconsistent with the endorser's personal experience or that were not made or approved by the advertiser and that go beyond the scope of the endorser's personal experience.<sup>24</sup> Current Example 5 involves such an endorser and the Commission proposes updating it to better illustrate this principle. Finally, § 255.1(e) would also note that endorsers may also be liable for failing to disclose unexpected material connections between themselves and an advertiser, such as when they create and disseminate endorsements without such disclosures.

A few commenters suggested that the Guides deal with the disclosure responsibility of intermediaries such as marketing and public relations firms.<sup>25</sup> The Commission proposes adding a new § 255.1(f) explaining the potential liability of intermediaries. Intermediaries, such as advertising agencies and public relations firms, may be liable for their roles in disseminating what they knew or should have known were deceptive endorsements.<sup>26</sup> For example, advertising agencies that intentionally engage in

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<sup>23</sup> See, e.g., Boyd at 13; and Dudukovich at 18.

<sup>24</sup> The Commission would add a cross-reference to § 255.3 with respect to the responsibilities of an expert endorser.

<sup>25</sup> See, e.g., Boyd at 13; and Maastricht at 7-8.

<sup>26</sup> See Complaint at 6, 8, 12-12, 20, *FTC v. Marketing Architects, Inc.*, No. 2:18-cv-00050 (D. Me. Feb. 6, 2018), <https://www.ftc.gov/system/files/documents/cases/1623101marketingarchitectscomplaint.pdf> (defendant advertising agency created and disseminated fictitious weight-loss testimonials).

deception or that ignore obvious shortcomings of claims they disseminate may be liable. They may also be liable for their roles with respect to endorsements that fail to disclose unexpected material connections, whether by disseminating advertisements without necessary disclosures of material connection or by hiring and directing the endorsers who fail to make necessary disclosures.<sup>27</sup>

The Commission proposes adding a new § 255.1(g) stating a general principle that the use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser.

The Commission proposes modifying current Example 1 to § 255.1 to note that an endorser does not need to go back and modify or delete past social media posts as long as the posts were not misleading when they were made and the dates of the posts are clear and conspicuous to viewers. However, the example would state that if the post was later reposted by the endorser or shared by the publisher, it would suggest to reasonable consumers that the endorser continued to hold the views expressed in the prior post.

The Commission proposes deleting current Example 2 to § 255.1 because it is patently obvious that a person asked to try unmarked products and pick the best one is not communicating that she or he is a regular user of the selected product. The Commission proposes to replace that example with one that illustrates when an endorsement would likely communicate regular use and ownership.

The Commission proposes editing current Example 3 to § 255.1 to indicate that a paid endorser and the company paying the endorser are both potentially liable for the endorser's social media post that fails to disclose the endorser's relationship to the company. The Commission proposes altering the example and adding a new cross-

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<sup>27</sup> See Complaint at 2-5, *In the Matter of Machinima, Inc.*, No. C-4569 (Sept. 2, 2015), <https://www.ftc.gov/system/files/documents/cases/160317machinimacmpt.pdf> (respondent recruited, hired, and instructed influencers on behalf of an advertiser, but did not require the influencers to disclose compensation).

reference in this example to the Guides' material connection provisions (§ 255.5) to make clear that those provisions apply to paid consultants and not just employees or those hired to be endorsers. The Commission also proposes adding alternative language to the example illustrating how the advertiser could be liable when the endorser is not liable.

The Commission proposes adding new Examples 6 and 7 to illustrate the principle in new § 255.1(g) involving the use of an image or likeness of a person other than the actual endorser to misrepresent a material attribute of the endorser. These examples involve endorsements for an acne product using an image of a person with much better skin than the actual endorser, a weight-loss product with an image of a person weighing much less than the actual endorser, and a learn-to-read program with a picture of a significantly younger child than the child of the endorser.

### **C. § 255.2 – Consumer Endorsements**

Section 255.2 of the Guides provides guidance specific to the use of consumer endorsements, commonly referred to as testimonials.

Current § 255.2(a) addresses the need for adequate substantiation for claims made through endorsements. The Commission proposes clarifying that this need for substantiation applies to both express and implied claims.

Current § 255.2(b) states that when the advertiser does not have substantiation that an endorser's experience is representative of what consumers will generally achieve, an ad should clearly and conspicuously disclose the generally expected performance in the depicted circumstances. The Commission proposes adding a clarifying statement that the disclosure of the generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect.

The Commission proposes adding a new § 255.2(d) that addresses consumer reviews and articulates a fundamental principle not expressly set forth in the existing Guides. It would state that in procuring, suppressing, boosting, organizing, or editing

consumer reviews of their products, advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products. It would also note that this is true regardless of whether the reviews are considered “endorsements” under the Guides.

The Commission proposes to expand current Example 2 of § 255.2 so as to illustrate how a disclosure of expected results can be misleading when those results are only true under limited circumstances not clearly stated in the ad.

Because current Example 3 of § 255.2 involves serum cholesterol lowering claims, the Commission proposes replacing “adequate substantiation” with “competent and reliable scientific evidence,” the type of substantiation that would be required for such claims.

Current Example 4 of § 255.2 provides two examples of acceptable weight-loss disclosures of generally expected results under different circumstances, one where a testimonialist reports her weight loss over a certain period and one where the testimonialist reports her weight loss without specifying a time period. The Commission proposes editing those disclosures to make them more informative for consumers.<sup>28</sup> The Commission would also add examples of two alternative disclosures that would be inadequate, one involving a disclosure of weight loss per week and the other involving a broad range of possible weight loss.

Another proposed addition to Example 4 discusses and illustrates how outliers can substantially affect the average results such that a disclosure of generally expected results

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<sup>28</sup> Example 4 provides an example of a performance claim requiring substantiation – a claim that WeightAway is an effective weight loss product. The Commission proposes revising that exemplar to include the claim that the endorser’s weight loss was not just due to her dietary restrictions and exercise regimen.



based upon a mean computation would be misleading and how, when such is the case, the disclosure could instead be based upon median results.

The Commission would also add language to Example 4 illustrating a marketer's liability for procuring fake reviews that appear for its product on a third-party review website. The marketer is not only liable for procuring reviews that are not from bona fide users, but is also liable for any unsubstantiated claims made in those fake reviews.<sup>29</sup>

Finally, the Commission proposes adding an alternative scenario to Example 4 involving an advertisement for a weight-loss program. The addition would explain that a disclosure of typical weight loss limited to only successful participants in the program (*e.g.*, only those who stuck with it for six months), ignoring participants who quit, would be inadequate.

The Commission proposes four new examples to illustrate the proposed new § 255.2(d).

New Example 8 addresses an online seller suppressing or not publishing product reviews based upon their star ratings or their negative sentiments.<sup>30</sup> The review portions of the seller's product pages are misleading as to purchasers' actual opinions of the products. The example would also provide examples of reviews that need not be published. The Commission would note that sellers are not required to display customer reviews that contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content, or content that is inappropriate with respect to race, gender, sexuality, or ethnicity, or reviews that the seller reasonably believes are fake, so long as the criteria for

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<sup>29</sup> See Complaint at 5-9, *FTC v. Cure Encapsulations, Inc.*, No. 1:19-cv-00982 (E.D.N.Y. Feb. 26, 2019), [https://www.ftc.gov/system/files/documents/cases/quality\\_encapsulations\\_complaint\\_2-26-19.pdf](https://www.ftc.gov/system/files/documents/cases/quality_encapsulations_complaint_2-26-19.pdf).

<sup>30</sup> See Complaint at 1-2, *In the Matter of Fashion Nova, LLC*, No. C-4759 (Mar. 18, 2022), [http://www.ftc.gov/system/files/ftc\\_gov/pdf/1923138C4759FashionNovaComplaint.pdf](http://www.ftc.gov/system/files/ftc_gov/pdf/1923138C4759FashionNovaComplaint.pdf).

withholding reviews are applied uniformly to all reviews submitted. The footnote would also note that sellers are not required to display reviews that are unrelated to their products or services and that “services” include customer service, delivery, returns, and exchanges. The Commission is particularly interested in consumer expectations regarding product reviews that are solely about related services. Do consumers expect that sellers publish such reviews that are just about a product’s shipping or refund practices or the associated customer service together with other product reviews? Finally, the example illustrates that it would be deceptive for a seller to highlight glowing reviews and label them as “most helpful” if consumers had not actually voted them most helpful.

New Example 9 addresses paying purchasers to write positive product reviews.<sup>31</sup> Such reviews are deceptive regardless of any disclosure of the payment, because the manufacturer has required that the reviews be positive. The proposed example has a cross-reference for when there is no requirement that the reviews be positive and the reviewers understand that they are free to write negative reviews without suffering any consequences.

New Example 10 addresses the unfair practice of threatening consumers who post negative reviews to third-party websites in order to coerce the consumers to delete their reviews. Such threats can take the form of legal,<sup>32</sup> physical, or other threats. As noted in a new proposed footnote to the Guides, when the threats are incorporated into a form contract, they violate the Consumer Review Fairness Act. 15 U.S.C. 45b(b)(1).

Several commenters suggested addressing review gating, *i.e.*, practices that involve obtaining customer feedback and then sending satisfied and dissatisfied customers down different paths in order to encourage positive reviews and avoid negative

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<sup>31</sup> See Complaint at 8, *In the Matter of UrthBox, Inc.*, No. C-4676 (April 3, 2019), [https://www.ftc.gov/system/files/documents/cases/172\\_3028\\_urthbox\\_complaint\\_4-3-19\\_0.pdf](https://www.ftc.gov/system/files/documents/cases/172_3028_urthbox_complaint_4-3-19_0.pdf).

<sup>32</sup> See *FTC v. Roca Labs, Inc.*, 345 F. Supp. 3d 1375, 1394-95 (M.D. Fla. 2018).

reviews.<sup>33</sup> New Example 11 discusses a marketer soliciting feedback from all customers and only inviting those who give positive feedback to write online reviews. It says that such disparate treatment may be an unfair or deceptive practice if it results in the posted reviews being substantially more positive than if the marketer had not engaged in the practice.

**D. § 255.3 – Expert Endorsements**

Section 255.3 provides guidance with respect to expert endorsements.

Current § 255.3(a) addresses advertisements that represent “directly or by implication” that an endorser is an expert with respect to the endorsement message. The Commission proposes clarifying that this section applies to representations made “expressly or by implication.”<sup>34</sup> The Commission proposes modifying current Example 2 to clarify that the non-medical “doctor” expert endorser should have relevant expertise and that the non-medical and non-specialized doctors referenced in the example do not necessarily have enough expertise to endorse the product even with a clear and conspicuous disclosure. The Commission also proposes amending current Example 6 – adding a sentence about the potential liability of the expert endorser and the advertiser, including a cross-reference to § 255.1. The Commission would clarify that what matters is the expert’s “purported” degree of expertise, not the expert’s actual degree of expertise. Finally, the Commission would also indicate in Example 6 that scientific evidence is expected to support a serum cholesterol lowering claim.

**E. § 255.4 – Endorsements by Organizations**

Section 255.4 provides guidance specific to the use of endorsements by organizations.

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<sup>33</sup> See, e.g., BBB at 5; Boyd at 23; Dudukovich at 13; and TINA at 22; *but see* ANA at 14.

<sup>34</sup> The Commission proposes making a similar change to § 255.2(c).

The Commission proposes to renumber the current example in § 255.4 as Example 1 and to add two additional examples.

New Example 2 would say that if a manufacturer sets up an apparently independent review website that reviews the manufacturer's own products and competing products, that website is deceptive because it is not in fact independent.<sup>35</sup>

New Example 3 addresses a third-party review site that provides rankings of various manufacturers' products and accepts payments in exchange for higher rankings. This practice was challenged in the Commission's case against LendEDU.<sup>36</sup> One commenter asked whether, based on that case, a disclosure is only required on such websites when they make claims that they are "objective," "accurate," and "unbiased."<sup>37</sup> The revised example would say that a paid ranking boost is deceptive regardless of whether the website makes an express claim of independence or objectivity. It also would note the potential liability of a manufacturer that pays for a higher ranking. Finally, it would say that if a manufacturer makes payments to the review site but not for higher rankings, there should be a clear and conspicuous disclosure regarding the payments, with a cross-reference to an example involving payments for affiliate links.

#### **F. § 255.5 – Disclosure of Material Connections**

Section 255.5 of the current Guides states that advertisers must disclose connections between themselves and their endorsers that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience). The text of this section also includes the example of a television ad

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<sup>35</sup> See Complaint at 8-9, *In the Matter of Son Le*, No. C-4619 (May 31, 2020), [https://www.ftc.gov/system/files/documents/cases/162\\_3178\\_c4619\\_trampoline\\_safety\\_of\\_america\\_complaint\\_0.pdf](https://www.ftc.gov/system/files/documents/cases/162_3178_c4619_trampoline_safety_of_america_complaint_0.pdf).

<sup>36</sup> See Complaint at 15, *In the Matter of Shop Tutors, Inc.*, No. C-4719 (Feb. 3, 2020), [https://www.ftc.gov/system/files/documents/cases/182\\_3180\\_lendedu\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/182_3180_lendedu_complaint.pdf).

<sup>37</sup> See AFSA at 2.

featuring an endorser who is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public.

The Commission believes the requirement that material connections between advertisers and endorsers be disclosed is appropriate and should be retained. The Commission proposes specifying that such disclosures must be “clear and conspicuous,” adding a definition of that phrase (as discussed above), and deleting the more ambiguous statement that such disclosures must be “fully” disclosed. It also proposes to delete the existing example from the text of the section and to replace it with more general guidance. A commenter asked for further guidance about what types of relationships could constitute material connections.<sup>38</sup> The proposed revised text of § 255.5 would explain that material connections can include a business, family, or personal relationship; monetary payment; the provision of free or discounted products or services to the endorser, including products or services unrelated to the endorsed product; early access to a product; or the possibility of winning a prize, of being paid, or of appearing on television or in other media promotions. The new guidance would state that a material connection can exist regardless of whether the advertiser requires an endorsement for the payment or free or discounted products.

Several commenters asked that the Commission provide examples of immaterial connections that need no disclosure.<sup>39</sup> The Commission proposes instead to recognize in the text of § 255.5 that some connections may be immaterial because they are too insignificant to affect the weight or credibility given to endorsements.

One commenter suggested that the Guides recognize that, for influencers primarily famous because of their social media presence, their sponsorships are often expected.<sup>40</sup> Without accepting or rejecting that proposition, the Commission proposes

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<sup>38</sup> See Boyd at 9.

<sup>39</sup> See, e.g., ANA at 10-12; CMA at 2; and NCTA at 10.

<sup>40</sup> See NRF at 4.

stating that an endorser's material connection need not to be disclosed when it is understood or expected by all but an insignificant portion of the audience.

One commenter requested that the Guides state that the exact nature or amount of an endorser's compensation need not be disclosed,<sup>41</sup> while another commenter asked that the Guides require influencers to state the amount of their compensation because it will help star-struck consumers appreciate the lack of honesty in celebrity posts.<sup>42</sup> The Commission proposes clarifying that the disclosure of a material connection does not require the complete details of the connection, but it must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance.

Commenters also expressed widely diverging opinions on the extent to which the Guides should address disclosures of material connections to children. Most of these commenters agreed that, as children grow, they are better able to understand what advertisements are and to distinguish them from other content. They also agreed that it is easier for children to recognize traditional television advertising than influencer marketing, with its blurring of organic content and marketing. Commenters diverged as to the ages at which and the extent to which disclosures can be effective. Some variously argued that disclosures of material connections are never effective for children, are ineffective at certain young ages, or should be more robust for children at certain ages.<sup>43</sup> At least one commenter argued that disclosures can work for younger kids.<sup>44</sup> Several commenters urged the Commission not to address this issue in the Guides at all and rely instead on self-regulatory organizations.<sup>45</sup> One commenter also noted that improving disclosures can help parents identify advertising to children.<sup>46</sup> Some commenters

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<sup>41</sup> *Id.* at 10.

<sup>42</sup> *See* Hoofnagle at 3.

<sup>43</sup> *See* CCFC at 3, 25; CSM at 1, 10; and TINA at 10-11.

<sup>44</sup> *See* SuperAwesome at 2; *see also* NetChoice at 11.

<sup>45</sup> *See* ANA at 9-10; DCN at 2; IAB at 5; and NCTA at 2-3.

<sup>46</sup> *See* CCFC at 23.

discussed or cited research studies in this area to support their views<sup>47</sup> or referred to the value of additional research.<sup>48</sup>

The Commission recognizes that it is difficult for children – especially younger children – to discern ads from entertainment or other content in the digital environment, where the lines are blurred much more than in traditional “linear” media, like television. For example, it may not be apparent to them when influencers are being paid to promote a product featured in their video and social media posts. Although not addressed in the comments, parents may play a role in promoting children’s understanding of advertising and lessening the effects of potentially deceptive practices. The Commission would benefit from more evidence than provided in the comments to develop specific guidance or best practices in this area. FTC staff thus plans to hold a public event to gather research and expert opinion on: (a) children’s capacities at different ages and developmental stages to recognize and understand advertising content and distinguish it from other content; (b) the need for and efficacy of disclosures as a solution to the problem facing children of different ages; and, (c) if disclosures can be efficacious, the most effective format, placement, and wording for disclosures. As discussed below, the Commission also proposes adding a new § 255.6 addressing endorsements directed to children.

The current Example 3 to § 255.5 makes clear that consumers would not expect that a celebrity was paid for endorsing a medical procedure during a routine interview on a television talk show, that knowledge of such a financial interest would likely affect the weight or credibility consumers give to that endorsement, and that the celebrity’s financial connection to the advertiser should be disclosed. One commenter said that the Guides should indicate that disclosures at the end of a talk show are not clear and

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<sup>47</sup> See, e.g., CCFC at 16-17, 21-23; CSM at 3-4, 6, 9; SuperAwesome at 3-5; and TINA at 10-11.

<sup>48</sup> See, e.g., BBB at 4; and CSM at 10.

conspicuous.<sup>49</sup> The Commission proposes edits to Example 3 noting that the disclosure should be during the interview and that a disclosure during the show's closing credits is not clear and conspicuous. A different commenter suggested that the Guides say that disclosure obligations exist even if an endorser is not paid for a particular post.<sup>50</sup> Revised Example 3 would say that, if the celebrity makes the endorsement in one of her social media posts, her connection to the advertiser should be disclosed regardless of whether she was paid for the particular post. The revised example would also illustrate that receipt of free or discounted services can constitute a material connection.

One comment suggested that the Guides address the reuse of an influencer's social media endorsement.<sup>51</sup> Revised Example 3 would also state that, when reusing a celebrity's social media posts in its own social media, an advertiser should clearly and conspicuously disclose its relationship to the celebrity (assuming the initial post necessitated a disclosure).

The current Example 4 to § 255.5 addresses the consumer expectation that an expert endorser would be reasonably compensated for appearing in an ad. The Commission proposes clarifying that the existing guidance applies to traditional ads, such as television ads, and adding an alternative scenario involving a post on the expert's own social media account, a context in which consumers would be less likely to expect that the expert was compensated and more likely to expect that the expert is expressing an independent opinion.

The current Example 5 to § 255.5 addresses a scenario in which restaurant patrons are informed before they enter that they will be interviewed by an advertiser as part of its TV promotion of its new food product. A commenter suggested that we clarify why this

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<sup>49</sup> See CW at 2-5.

<sup>50</sup> See Dudukovich at 30, 62.

<sup>51</sup> See IZEA at 1.



information is material.<sup>52</sup> The Commission proposes explaining that a patron might want to give the product a good review in the hope of appearing on television.

Several commenters said that incentivized reviews need disclosures even if the incentives are not conditioned on the reviews being positive.<sup>53</sup> Current Example 6 to § 255.5 addresses the situation where “extras” who want to work in commercials are recruited to use a product and endorse it in an infomercial in exchange for compensation and exposure. The Commission proposes expanding the example to address ordinary consumers recruited to try a product for free and write online reviews of it in exchange for payment; the example would state the need to disclose this connection in the resulting reviews. The example has a cross-reference to § 255.2(d) and Example 9 of § 255.2 for situations in which an incentive is conditioned on a review being positive or recruited consumers have reason to believe there are or may be negative consequences from posting reviews which are not positive. Multiple comments also raised concerns regarding incentivized reviews being included in an average star rating.<sup>54</sup> The proposed example states that, even if adequate disclosures appear in each incentivized review, the practice could still be deceptive if those solicited reviews’ star ratings are included in an average star rating for the product, and their inclusion materially increases that average star rating.

The Commission proposes to modify Example 7 to § 255.5 to say that if a significant proportion of viewers are likely unaware that a woodworking influencer received a valuable piece of equipment for free from its manufacturer, he should clearly and conspicuously disclose that he got it for free. The Commission would make this example conditional in recognition of the possibility that the followers of some

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<sup>52</sup> See Dudukovich at 24-25.

<sup>53</sup> See, e.g., AFSA at 3-4; BBB at 4-5; Boyd at 21-22; Dudukovich at 12-13; NAIMA at 4-5; and TINA at 21; *but see* CRN at 4-5.

<sup>54</sup> See, e.g., AFSA at 4; BBB at 5; NAIMA at 5; and TINA at 21-22.

influencers or types of influencers may expect that they receive free products from advertisers. The Commission would also add a cross-reference to § 255.1(d) about the liability and responsibilities of advertisers.

The current Example 8 to § 255.5 addresses an employee's endorsement of an employer's product in an online community and the resulting need for a disclosure. A comment asked that the Commission add a statement about the employer educating its employees about disclosure requirements. The Commission proposes adding an explanation of an employer's obligations and noting that this guidance also applies to online consumer reviews.

The Commission is also proposing the addition of three new examples to § 255.5.

The first one arises from the request of commenters that the Commission include an example illustrating conditions under which third-party certifications and seals of approval, which typically require payment to the certifying organization to fund the evaluation, do not require a disclosure.<sup>55</sup> New Example 10, which is a slightly edited version of an example in the Green Guides,<sup>56</sup> recognizes that consumers would reasonably expect that marketers have to pay non-profit, third-party organizations reasonable fees for some certifications and seals.

Second, multiple commenters asked that the Guides address the need to disclose affiliate relationships and the adequacy of affiliate links<sup>57</sup> while one commenter asserted that consumers understand such links and that no disclosure is necessary.<sup>58</sup> New Example 11 addresses the disclosure of affiliate links. It says that a blogger who writes independent content reviewing products and who monetizes that content with affiliate links should clearly and conspicuously disclose the compensation.

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<sup>55</sup> See CRN at 4; and KK&B at 1-2; *see also* NAIMA at 4.

<sup>56</sup> See Guides for the Use of Environmental Marketing Claims, 16 CFR 290.6, Example 8.

<sup>57</sup> See, e.g., AFSA at 4; BBB at 5, 11-12; Boyd at 24-25; CRN at 3, Consumer Reports at 10; Dudukovich at 14, 52; Maastricht at 7; and NMA at 3.

<sup>58</sup> See NRF at 10.

Third, new Example 12 recognizes that, just as with television commercials, consumers can reasonably expect that people appearing in certain newer-form advertisements are compensated for their statements.

**G. New § 255.6 – Endorsements Directed to Children**

As discussed above, endorsements directed to children may be of special concern. The Commission proposes adding a section simply acknowledging that fact, as to which we are aware of no disagreement. It would state, “Endorsements in advertisements addressed to children may be of special concern because of the character of the audience. Practices which would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases.” The Commission proposed a very similar section in 1972 as § 255.6,<sup>59</sup> but withdrew it in 1975, stating that it had “determined that the area of children’s advertising could not be completely covered in these Guides.”<sup>60</sup> The Commission now believes that even as more evidence is gathered about the effects of children’s advertising, there is ample basis to recognize that children may react differently than adults to endorsements in advertising or to related disclosures.

**Request for Comment**

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write “Endorsement Guides; P204500” on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the <https://www.regulations.gov> website.

Because of the agency’s heightened security screening, postal mail addressed to the Commission will be subject to delay. We strongly encourage you to submit your

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<sup>59</sup> See 37 FR 25,548 (Dec. 1, 1972).

<sup>60</sup> See 40 FR 22,127 (May 1, 1975).

comments online through the <https://www.regulations.gov> website. To ensure the Commission considers your online comment, please follow the instructions on the web-based form.

If you file your comment on paper, write “Endorsement Guides; P204500” on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex B), Washington, DC 20580.

Because your comment will be placed on the public record, you are solely responsible for making sure that your comment does not include any sensitive or confidential information. In particular, your comment should not contain sensitive personal information, such as your or anyone else’s Social Security number; date of birth; driver’s license number or other state identification number or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include any sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any “[t]rade secret or any commercial or financial information which . . . is privileged or confidential” – as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2) – including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled “Confidential,” and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record.

See FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted publicly at [www.regulations.gov](http://www.regulations.gov) – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC website to read this document and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments it receives on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission’s privacy policy, including routine uses permitted by the Privacy Act, see <https://www.ftc.gov/site-information/privacy-policy>.

#### **List of Subjects in 16 CFR Part 255**

Advertising, Trade Practices

Accordingly, the Federal Trade Commission proposes to revise 16 CFR part 255 to read as follows:

#### **PART 255 – GUIDES CONCERNING USE OF ENDORSEMENTS AND TESTIMONIALS IN ADVERTISING**

Sec.

255.0 Purpose and definitions.

255.1 General considerations.

255.2 Consumer endorsements.

255.3 Expert endorsements.

255.4 Endorsements by organizations.

255.5 Disclosure of material connections.

255.6 Endorsements directed to children.

**Authority:** 38 Stat. 717, as amended; 15 U.S.C. 41-58

#### **§ 255.0 Purpose and definitions.**

(a) The Guides in this part represent administrative interpretations of laws enforced by the Federal Trade Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. Specifically, the Guides address the application of section 5 of the FTC Act (15 U.S.C. 45) to the use of endorsements and testimonials in advertising. The Guides provide the basis for voluntary compliance with the law by advertisers and endorsers. Practices inconsistent with these Guides may result in corrective action by the Commission under section 5 if, after investigation, the Commission has reason to believe that the practices fall within the scope of conduct declared unlawful by the statute. The Guides set forth the general principles that the Commission will use in evaluating endorsements and testimonials, together with examples illustrating the application of those principles. The Guides do not purport to cover every possible use of endorsements in advertising.<sup>1</sup> Whether a particular endorsement or testimonial is deceptive will depend on the specific factual circumstances of the advertisement at issue.

(b) For purposes of this part, an “endorsement” means any advertising, marketing, or promotional message (including verbal statements, tags in social media posts, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the “endorser” and could be or appear to be an individual, group, or institution.

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<sup>1</sup> Staff business guidance applying section 5 of the FTC Act to endorsements and testimonials in advertising is available on the FTC website. Such staff guidance addresses details not covered in these Guides and is updated periodically but is not approved by or binding upon the Commission.

(c) The Commission intends to treat endorsements and testimonials identically in the context of its enforcement of the Federal Trade Commission Act and for purposes of this part. The term endorsements is therefore generally used hereinafter to cover both terms and situations.

(d) For purposes of this part, the term “product” includes any product, service, brand, company, or industry.

(e) For purposes of this part, an “expert” is an individual, group, or institution possessing, as a result of experience, study, or training, knowledge of a particular subject, which knowledge is superior to what ordinary individuals generally acquire.

(f) For purposes of this part, “clear and conspicuous” means that a disclosure is difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers. If a communication’s representation necessitating a disclosure is made through visual means, the disclosure should be made in at least the communication’s visual portion; if the representation is made through audible means, the disclosure should be made in at least the communication’s audible portion; and if the representation is made through both visual and audible means, the disclosure should be made in the communication’s visual and audible portions. A disclosure presented simultaneously in both the visual and audible portions of a communication is more likely to be clear and conspicuous. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, should stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood. An audible disclosure should be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it. In any communication using an interactive electronic medium, such as social media or the Internet, the disclosure should be unavoidable. The disclosure should not be contradicted or mitigated by, or inconsistent with, anything else in the

communication. When an endorsement targets a specific audience, such as older adults, “ordinary consumers” includes members of that group.

(g) Examples:

(1) *Example 1.* A film critic’s review of a movie is excerpted in an advertisement placed by the film’s producer. When so used, the excerpt is an endorsement because readers would view it as a statement of the critic’s own opinions and not those of the producer. If the excerpt alters or quotes from the text of the review in a way that does not fairly reflect its substance, the advertisement would be deceptive because it distorts the endorser’s opinion. (See § 255.1(b))

(2) *Example 2.* A television commercial depicts two unidentified shoppers in a supermarket buying a laundry detergent. One comments to the other how clean the advertised brand makes the shopper’s clothes. The other shopper then replies, “I will try it because I have not been fully satisfied with my own brand.” This obviously fictional dramatization would not be an endorsement.

(3) *Example 3.* In an advertisement for a pain remedy, an announcer unfamiliar to consumers except as a spokesperson for the advertising drug company praises the drug’s ability to deliver fast and lasting pain relief. The spokesperson purports to speak, not on the basis of their own opinions, but rather in the place of and on behalf of the drug company. The announcer’s statements would not be considered an endorsement.

(4) *Example 4.* A manufacturer of automobile tires hires a well-known professional automobile racing driver to deliver its advertising message in television commercials. In these commercials, the driver speaks of the smooth ride, strength, and long life of the tires. Many consumers are likely to believe this message reflects the driver’s personal views, even if the driver does not say so, because consumers recognize the speaker as primarily a racing driver and not merely as a spokesman. Accordingly, consumers may well believe the driver would not speak for an automotive product



without actually believing in their statements and having personal knowledge sufficient to form the beliefs expressed. The attribution of these beliefs to the driver makes this message an endorsement under the Guides.

(5) *Example 5.* (i) A television advertisement for a brand of golf balls includes a video of a prominent and well-recognized professional golfer practicing numerous drives off the tee. The video would be an endorsement even though the golfer makes no verbal statement in the advertisement.

(ii) The golfer is also hired to post the video to their social media account. The post is an endorsement if viewers can readily identify the golf ball brand, either because it is apparent from the video or because it is tagged or otherwise mentioned in the post.

(6) *Example 6.* (i) An infomercial for a home fitness system is hosted by a well-known actor. During the infomercial, the actor demonstrates the machine and states, “This is the most effective and easy-to-use home exercise machine that I have ever tried. Even if the actor is reading from a script, the statement would be an endorsement, because consumers are likely to believe it reflects the actor’s personal views.

(ii) Assume that, rather than speaking about their experience with or opinion of the machine, the actor says that the machine was designed by exercise physiologists at a leading university, that it isolates each of five major muscle groups, and that it is meant to be used for fifteen minutes a day. After demonstrating various exercises using the machine, the actor finally says how much the machine costs and how to order it. As the actor does not say or do anything during the infomercial that would lead viewers to believe that the actor is expressing their own views about the machine, there is no endorsement.

(7) *Example 7.* (i) A consumer who regularly purchases a particular brand of dog food decides one day to purchase a new, more expensive brand made by the same manufacturer. The purchaser posts to their social media account that the change in diet

has made their dog's fur noticeably softer and shinier, and that in her opinion, the new dog food definitely is worth the extra money. Because the consumer has no connection to the manufacturer beyond being an ordinary purchaser, their message cannot be attributed to the manufacturer and the post would not be deemed an endorsement under the Guides. The same would be true if the purchaser writes a consumer product review on the manufacturer's website, a retailer's website, or an independent review website.

(ii) Assume that rather than purchase the dog food with their own money, the consumer receives it for free because the store routinely tracks purchases and the dog food manufacturer arranged for the store to provide a coupon for a free trial bag of its new brand to all purchasers of its existing brand. The manufacturer does not ask coupon recipients for product reviews and recipients likely would not assume that the manufacturer expects them to post reviews. The consumer's post would not be deemed an endorsement under the Guides because this unsolicited review cannot be attributed to the manufacturer.

(iii) Assume now that the consumer joins a marketing program under which participants periodically receive free products from various manufacturers and can write reviews if they want to do so. If the consumer receives a free bag of the new dog food through this program, their positive review would be considered an endorsement under the Guides because of their connection to the manufacturer through the marketing program.

(8) *Example 8.* A college student, who has earned a reputation as an excellent video game player, live streams their game play. The developer of a new video game pays the student to play and live stream its new game. The student plays the game and appears to enjoy it. Even though the college student does not expressly recommend the game, the game play is considered an endorsement.

(9) *Example 9.* (i) An influencer who is paid to endorse a vitamin product in their social media posts discloses their connection to the product's manufacturer only on the profile pages of their social media accounts. The disclosures are not clear and conspicuous because people seeing their paid posts could easily miss the disclosures.

(ii) Assume now that the influencer discloses their connection to the manufacturer in the posts themselves, but that, in order to see the disclosures, consumers have to click on a link labeled simply "more." Those disclosures are not clear and conspicuous.

(iii) Assume now that the influencer relies solely upon a social media platform's built-in disclosure tool for one of these posts. The disclosure appears in small white text, it is set against the light background of the image that the influencer posted, it competes with unrelated text that the influencer superimposed on the image, and the post appears for only five seconds. The disclosure is easy to miss and thus not clear and conspicuous.

(10) *Example 10.* A television advertisement promotes a smartphone app that purportedly halts cognitive decline. The ad presents multiple endorsements by older senior citizens who are represented as actual consumers who used the app. The advertisement discloses via both audio and visual means that the persons featured are actors. Because the advertisement is targeted at older consumers, whether the disclosure is clear and conspicuous will be evaluated from the perspective of older consumers, including those with diminished auditory, visual, or cognitive processing abilities.

(11) *Example 11.* (i) A social media advertisement promoting a cholesterol-lowering product features a testimonialist who says how much they lowered their serum cholesterol. The claimed reduction greatly exceeds what is typically experienced by users of the product and a disclosure of typical results is required. The marketer has been able to identify from online data collection Spanish speaking individuals with high cholesterol levels who are unable to understand English and microtargets a Spanish-language version of the ad to them, disclosing the typical results

in English. The adequacy of the disclosure will be evaluated from the perspective of the targeted individuals.

(ii) Assume now that the ad has a disclosure that is clear and conspicuous when viewed on a computer browser but that is not clear and conspicuous when the ad is rendered on a smartphone. Because some consumers will view the ad on their smartphones, the disclosure is inadequate.

(12) *Example 12.* An exterminator purchases fake negative reviews of competing exterminators. A paid or otherwise incentivized negative statement about a competitor's product is not an endorsement, as that term is used in the Guides. Nevertheless, such statements, e.g., a paid negative review of a competing product, can be deceptive in violation of section 5.

(13) *Example 13.* A motivational speaker buys fake social media followers to impress potential clients. The use by endorsers of fake indicators of social media influence, such as fake social media followers, is not itself an endorsement issue. The Commission notes, however, that it is a deceptive practice for users of social media platforms to purchase or create indicators of social media influence and then use them to misrepresent such influence to potential clients, purchasers, investors, partners, or employees or to anyone else for a commercial purpose. It is also a deceptive practice to sell or distribute such indicators to such users.

#### **§ 255.1 General considerations.**

(a) Endorsements must reflect the honest opinions, findings, beliefs, or experience of the endorser. Furthermore, an endorsement may not convey any express or implied representation that would be deceptive if made directly by the advertiser (*see* § 255.2(a) and (b) regarding substantiation of representations conveyed by consumer endorsements).

(b) An advertisement need not present an endorser's message in the exact words of the endorser unless the advertisement presents the endorsement as a quotation.

However, the endorsement may not be presented out of context or reworded so as to distort in any way the endorser's opinion or experience with the product. An advertiser may use an endorsement of an expert or celebrity only so long as it has good reason to believe that the endorser continues to subscribe to the views presented. An advertiser may satisfy this obligation by securing the endorser's views at reasonable intervals where reasonableness will be determined by such factors as new information about the performance or effectiveness of the product, a material alteration in the product, changes in the performance of competitors' products, and the advertiser's contract commitments.

(c) When the advertisement represents that the endorser uses the endorsed product, the endorser must have been a bona fide user of it at the time the endorsement was given. Additionally, the advertiser may continue to run the advertisement only so long as it has good reason to believe that the endorser remains a bona fide user of the product (*see* § 255.1(b) regarding the "good reason to believe" requirement).

(d) Advertisers are subject to liability for misleading or unsubstantiated statements made through endorsements when there is a connection between the advertiser and the endorser, or for failing to disclose unexpected material connections between themselves and their endorsers (*see* § 255.5). An advertiser may be liable for an endorser's deceptive statement even when the endorser is not liable. Advertisers should:

- (1) Provide guidance to their endorsers on the need to ensure that their statements are not misleading and to disclose unexpected material connections;
- (2) Monitor their endorsers' compliance; and
- (3) Take action sufficient to remedy non-compliance and prevent future non-compliance.

(e) Endorsers may be liable for statements made in the course of their endorsements, such as when an endorser makes a representation that the endorser knows or should know to be deceptive. Also, an endorser who is not an expert may be liable for

misleading or unsubstantiated representations regarding a product's performance or effectiveness when the representations are inconsistent with the endorser's personal experience, or were not made or approved by the advertiser and go beyond the scope of the endorser's personal experience (for the responsibilities of an endorser who is an expert, *see* § 255.3). Endorsers may also be liable for failing to disclose unexpected material connections between themselves and an advertiser, such as when an endorser creates and disseminates endorsements without such disclosures.

(f) Intermediaries, such as advertising agencies and public relations firms, may be liable for their roles in disseminating what they knew or should have known were deceptive endorsements. They may also be liable for their roles with respect to endorsements that fail to disclose unexpected material connections, whether by disseminating advertisements without necessary disclosures or by hiring and directing endorsers who fail to make necessary disclosures.

(g) The use of an endorsement with the image or likeness of a person other than the actual endorser is deceptive if it misrepresents a material attribute of the endorser.

(h) Examples:

(1) *Example 1.* (i) A building contractor states in an advertisement disseminated by an advertiser, "I use XYZ exterior house paint because of its remarkable quick drying properties and durability." This endorsement must comply with the pertinent requirements of § 255.3. Subsequently, the advertiser reformulates its paint to enable it to cover exterior surfaces with only one coat. Prior to continued use of the contractor's endorsement, the advertiser must contact the contractor in order to determine whether the contractor would continue to use the paint and to subscribe to the views presented previously.

(ii) Assume that, before the reformulation, the contractor had posted an endorsement of the paint to their social media account. Even if the contractor would not

use or recommend the reformulated paint, there is no obligation to modify or delete their post as long as the date of that post is clear and conspicuous to viewers. If the contractor reposts or the advertiser shares the contractor's original endorsement after the reformulation, consumers would expect that the contractor continued to hold the views expressed in the original post.

(2) *Example 2.* In a radio advertisement, a well-known DJ talks about how much they enjoy making coffee with a particular coffee maker in the morning. The DJ's comments likely communicate that they own and regularly use the coffee maker. If they do not own it or used it only during a demonstration by its manufacturer, the ad would be deceptive.

(3) *Example 3.* (i) A dermatologist is a paid advisor to a pharmaceutical company and is asked by the company to post about its products on their professional social media account. The dermatologist posts that the company's newest acne treatment product is "clinically proven" to work. Before giving the endorsement, the dermatologist received a write-up of the clinical study in question, which indicates flaws in the design and conduct of the study that are so serious that they preclude any conclusions about the efficacy of the product. Given their medical expertise, the dermatologist should have recognized the study's flaws and is subject to liability for their false statements made in the advertisement. The advertiser is also liable for the misrepresentation made through the endorsement (*see* § 255.3 regarding the product evaluation that an expert endorser must conduct). Even if the study was sufficient to establish the product's proven efficacy, the pharmaceutical company and the dermatologist are both potentially liable if the endorser fails to disclose their relationship to the company (*see* § 255.5 regarding the disclosure of unexpected material connections).

(ii) Assume that the expert had asked the pharmaceutical company for the evidence supporting its claims and there were no apparent design or execution flaws in

the study shown to the expert, but that the pharmaceutical company had withheld a larger and better controlled, non-published proprietary study of the acne treatment which failed to find any statistically significant improvement in acne. The expert's "clinically proven" to work claim would be deceptive and the company would be liable for the claim, but because the dermatologist did not have a reason to know that the claim was deceptive, the expert would not be liable.

(4) *Example 4.* A well-known celebrity appears in an infomercial for a hot air roaster that purportedly cooks a chicken perfectly in twenty minutes. During the shooting of the infomercial, the celebrity watches five attempts to cook chickens using the roaster. In each attempt, the chicken is undercooked after twenty minutes and requires forty-five minutes of cooking time. In the commercial, the celebrity places an uncooked chicken in the roaster. The celebrity then takes from a second roaster what appears to be a perfectly cooked chicken, tastes the chicken, and says that if you want perfect chicken every time, in just twenty minutes, this is the product you need. A significant percentage of consumers are likely to believe the statement represents the celebrity's own view and experience even though the celebrity is reading from a script. Because the celebrity knows that their statement is untrue, the endorser is subject to liability. The advertiser is also liable for misrepresentations made through the endorsement.

(5) *Example 5.* (i) A skin care products advertiser hires an influencer to promote its products on the influencer's social media account. The advertiser requests that the influencer try a new body lotion and post a video review of it. The advertiser does not provide the influencer with any materials stating that the lotion cures skin conditions and the influencer does not ask the advertiser if it does. However, believing that the lotion cleared up their eczema, the influencer says in their review, "This lotion cures eczema. All of my followers suffering from eczema should use it." The advertiser is subject to liability for misleading or unsubstantiated representations made through the influencer's



endorsement. Furthermore, the influencer, who did not limit their claims to their personal experience and did not have a reasonable basis for their claim that the lotion cures eczema, is subject to liability for the misleading or unsubstantiated representation in endorsement. The influencer and the advertiser may also be liable if the influencer fails to disclose clearly and conspicuously being paid for the endorsement (*see* § 255.5).

(ii) In order to limit its potential liability, the advertiser should provide guidance to its influencers concerning the need to ensure that statements they make are truthful and substantiated and the need to disclose unexpected material connections and take other steps to discourage or prevent non-compliance. The advertiser should also monitor its influencers' compliance and take steps necessary to remove and halt the continued publication of deceptive representations when they are discovered and to ensure the disclosure of unexpected material connections (*see* §§ 255.1(d) and 255.5).

(6) *Example 6.* (i) The website for an acne treatment features accurate testimonials of users who say that the product improved their acne quickly and with no side effects. Instead of using images of the actual endorsers, the website accompanies the testimonials with pictures of different individuals with near perfect skin. The images misrepresent the improvements to the endorsers' complexions.

(ii) The same website also sells WeightAway shakes and features an accurate testimonial from an individual who says, "I lost 50 pounds by just drinking the shakes." Instead of accompanying the testimonial with a picture of the actual endorser, who went from 300 pounds to 250 pounds, the website shows a picture of an individual who appears to weigh about 100 pounds. By suggesting that WeightAway shakes caused the endorser to lose one-third of their original body weight, the image misrepresents the product's effectiveness. Even if it is accompanied by a picture of the actual endorser, the testimonial could still communicate a deceptive typicality claim.

(7) *Example 7.* A learn-to-read program disseminates a sponsored social media post by a parent saying that the program helped their child learn to read. The picture accompanying the post is not of the endorser and their child. The testimonial is from the parent of a 7-year-old, but the post shows an image of a child who appears to be only 4 years old. By suggesting that the program taught a 4-year-old to read, the image misrepresents the effectiveness of the program.

## **§ 255.2 Consumer endorsements.**

(a) An advertisement employing endorsements by one or more consumers about the performance of an advertised product or service will be interpreted as representing that the product or service is effective for the purpose depicted in the advertisement. Therefore, the advertiser must possess and rely upon adequate substantiation, including, when appropriate, competent and reliable scientific evidence, to support express and implied claims made through endorsements in the same manner the advertiser would be required to do if it had made the representation directly, *i.e.*, without using endorsements. Consumer endorsements themselves are not competent and reliable scientific evidence.

(b) An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation. If the advertiser does not have substantiation that the endorser's experience is representative of what consumers will generally achieve, the advertisement should clearly and conspicuously disclose the generally expected performance in the depicted circumstances, and the advertiser must possess and rely on adequate substantiation for that representation. The disclosure of the

generally expected performance should be presented in a manner that does not itself misrepresent what consumers can expect.

(c) Advertisements presenting endorsements by what are represented, expressly or by implication, to be “actual consumers” should utilize actual consumers in both the audio and video, or clearly and conspicuously disclose that the persons in such advertisements are not actual consumers of the advertised product.

(d) In procuring, suppressing, boosting, organizing, or editing consumer reviews of their products, advertisers should not take actions that have the effect of distorting or otherwise misrepresenting what consumers think of their products, regardless of whether the reviews are considered endorsements under the Guides.

(e) Examples:

(1) *Example 1.* (i) A web page for a baldness treatment consists entirely of testimonials from satisfied customers who say that after using the product, they had amazing hair growth and their hair is as thick and strong as it was when they were teenagers. The advertiser must have competent and reliable scientific evidence that its product is effective in producing new hair growth.

(ii) The web page will also likely communicate that the endorsers’ experiences are representative of what new users of the product can generally expect. Therefore, even if the advertiser includes a disclaimer such as, “Notice: These testimonials do not prove our product works. You should not expect to have similar results,” the ad is likely to be deceptive unless the advertiser has adequate substantiation that new users typically will experience results similar to those experienced by the testimonialists.

(2) *Example 2.* (i) An advertisement disseminated by a company that sells heat pumps presents endorsements from three individuals who state that after installing the company’s heat pump in their homes, their monthly utility bills went down by \$100,

\$125, and \$150, respectively. The ad will likely be interpreted as conveying that such savings are representative of what consumers who buy the heat pump can generally expect. The advertiser does not have substantiation for that representation because, in fact, fewer than 20% of purchasers will save \$100 or more. A disclosure such as, “Results not typical” or “These testimonials are based on the experiences of a few people and you are not likely to have similar results” is insufficient to prevent this ad from being deceptive because consumers will still interpret the ad as conveying that the specified savings are representative of what consumers can generally expect.

(A) In another context, the Commission tested the communication of advertisements containing testimonials that clearly and prominently disclosed either “Results not typical” or the stronger “These testimonials are based on the experiences of a few people and you are not likely to have similar results.” Neither disclosure adequately reduced the communication that the experiences depicted are generally representative. Based upon this research, the Commission believes that similar disclaimers regarding the limited applicability of an endorser’s experience to what consumers may generally expect to achieve are unlikely to be effective. Although the Commission would have the burden of proof in a law enforcement action, the Commission notes that an advertiser possessing reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive will avoid the risk of the initiation of such an action in the first instance.

(B) The advertiser should clearly and conspicuously disclose the generally expected savings and have adequate substantiation that homeowners can achieve those results. There are multiple ways that such a disclosure could be phrased, *e.g.*, “the average homeowner saves \$35 per month,” “the typical family saves \$50 per month during cold months and \$20 per month in warm months,” or “most families save 10% on their utility bills.”

(ii) Disclosures like those in *Example 2(i)(B)* could still be misleading, however, if they only apply to limited circumstances that are not described in the advertisement. For example, if the advertisement does not limit its claims by geography, it would be misleading if the disclosure of expected results in a nationally disseminated advertisement was based on the experiences of customers in a southern climate and the experiences of those customers was much better than could be expected by heat pump users in a northern climate.

(3) *Example 3.* An advertisement for a cholesterol-lowering product features individuals who claim that their serum cholesterol went down by 120 points and 130 points, respectively; the ad does not mention the endorsers having made any lifestyle changes. A well-conducted clinical study shows that the product reduces the cholesterol levels of individuals with elevated cholesterol by an average of 15% and the advertisement clearly and conspicuously discloses this fact. Despite the presence of this disclosure, the advertisement would be deceptive if the advertiser does not have competent and reliable scientific evidence that the product can produce the specific results claimed by the endorsers (*i.e.*, a 130-point drop in serum cholesterol without any lifestyle changes).

(4) *Example 4.* (i) An advertisement for a weight-loss product features a formerly obese person. The endorser says in the ad, “Every day, I drank 2 WeightAway shakes, ate only raw vegetables, and exercised vigorously for six hours at the gym. By the end of six months, I had gone from 250 pounds to 140 pounds.” The advertisement accurately describes the endorser’s experience, and such a result is within the range that would be generally experienced by an extremely overweight individual who consumed WeightAway shakes, only ate raw vegetables, and exercised as the endorser did. Because the endorser clearly describes the limited and truly exceptional circumstances under which they achieved the claimed results, the ad is not likely to convey that consumers

who weigh substantially less or use WeightAway under less extreme circumstances will lose 110 pounds in six months. If the advertisement simply says that the endorser lost 110 pounds in six months using WeightAway together with diet and exercise, however, this description would not adequately alert consumers to the truly remarkable circumstances leading to the endorser's weight loss. The advertiser must have substantiation, however, for any performance claims conveyed by the endorsement (*e.g.*, that WeightAway is an effective weight loss product and that the endorser's weight loss was not caused solely by their dietary restrictions and exercise regimen).

(ii) If, in the alternative, the advertisement simply features "before" and "after" pictures of a woman who says "I lost 50 pounds in 6 months with WeightAway," the ad is likely to convey that the endorser's experience is representative of what consumers will generally achieve. Therefore, if consumers cannot generally expect to achieve such results, the ad would be deceptive. Instead, the ad should clearly and conspicuously disclose what they can expect to lose in the depicted circumstances (*e.g.*, "women who use WeightAway for six months typically lose 15 pounds"). A disclosure such as "Average weight loss is 1-2 pounds per week" is inadequate and likely deceptive. It does not communicate the period over which such weight loss can be expected and likely implies that such weight loss continues at that rate indefinitely.

(iii) If the ad features the same pictures but the testimonialist simply says, "I lost 50 pounds with WeightAway," and WeightAway users generally do not lose 50 pounds, the ad should disclose what results they do generally achieve (*e.g.*, "women who use WeightAway lose 15 pounds on average"). A disclosure such as "most women who use WeightAway lose between 10 and 50 pounds" is inadequate because the range specified is so broad that it does not sufficiently communicate what users can generally expect.

(iv) Assume that a WeightAway advertisement contains a disclosure of generally expected results that is based upon the mean weight loss of users. If the mean is

substantially affected by outliers, then the disclosure would be misleading. For example, if the mean weight loss is 15 pounds, but the median weight loss is 8 pounds, it would be misleading to say that the average weight loss was 15 pounds. In such cases, the disclosure's use of median weight loss instead could help avoid deception, *e.g.*, "most users lose 8 pounds" or "the typical user loses 8 pounds."

(v) Assume that WeightAway's manufacturer procured a fake consumer review, reading "I lost 50 pounds with WeightAway," and had it published on a third-party review website. This endorsement is deceptive because it was not written by a bona fide user (*see* § 255.1(c)). Moreover, the manufacturer would need competent and reliable scientific evidence that WeightAway is capable of causing 50-pound weight loss.

(vi) Assume that WeightAway is a diet and exercise program and a person appearing in a WeightAway ad says, "I lost 50 pounds in 6 months with WeightAway." Very few WeightAway users lose 50 pounds in 6 months and the ad discloses, "The typical weight loss of WeightAway users who stick with the program for 6 months is 35 pounds." In fact, only one-fifth of those who start the WeightAway program stick with it for 6 months. The disclosure is inadequate because it does not communicate what the typical outcome is for users who start the program. In other words, even with the disclosure, the ad does not communicate what people who join the WeightAway program can generally expect.

(5) *Example 5.* An advertisement presents the results of a poll of consumers who have used the advertiser's cake mixes as well as their own recipes. The results purport to show that the majority believed that their families could not tell the difference between the advertised mix and their own cakes baked from scratch. Many of the consumers are pictured in the advertisement along with relevant, quoted portions of their statements endorsing the product. This use of the results of a poll or survey of consumers represents

that this is the typical result that ordinary consumers can expect from the advertiser's cake mix.

(6) *Example 6.* An advertisement appears to show a "hidden camera" situation in a crowded cafeteria at breakfast time. A spokesperson for the advertiser asks a series of patrons of the cafeteria for their spontaneous, honest opinions of the advertiser's recently introduced breakfast cereal. Even though none of the patrons is specifically identified during the advertisement, the net impression conveyed to consumers may well be that these are actual customers. If actors have been employed, this fact should be clearly and conspicuously disclosed.

(7) *Example 7.* (i) An advertisement for a recently released motion picture shows three individuals coming out of a theater, each of whom gives a positive statement about the movie. These individuals are actual consumers expressing their personal views about the movie. The advertiser does not need to have substantiation that their views are representative of the opinions that most consumers will have about the movie. Because the consumers' statements would be understood to be the subjective opinions of only three people, this advertisement is not likely to convey a typicality message.

(ii) If the motion picture studio had approached these individuals outside the theater and offered them free tickets if they would talk about the movie on camera afterwards or post about it on social media, that arrangement should be clearly and conspicuously disclosed (*see* § 255.5).

(8) *Example 8.* (i) A camping goods retailer's website has various product pages. Each product page provides consumers with the opportunity to review the product and rate it on a five-star scale. Each such page displays the product's average star rating and a breakdown of the number of reviews with each star rating, followed by individual consumers' reviews and ratings. As such, the website is representing that it is providing an accurate reflection of the view of the purchasers who submitted product reviews to the



website. If the retailer chose to suppress or otherwise not publish any reviews with fewer than four stars or reviews that contain negative sentiments, the product pages would be misleading as to purchasers' actual opinions of the products.

(ii) If the retailer chose not to post reviews containing profanity, that would not be unfair or deceptive even if reviews containing profanity tend to be negative reviews. However, it would be misleading if the retailer blocked only negative reviews containing profanity, but posted positive reviews containing profanity. It would be acceptable for the retailer to have a policy against posting reviews unrelated to the product at issue or related services, for example reviews complaining about the owner's policy positions. But it would be misleading if the retailer chose to filter reviews based on other factors that are only a pretext for filtering them based on negativity. Sellers are not required to display customer reviews that contain unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content, or content that is inappropriate with respect to race, gender, sexuality, or ethnicity, or reviews that the seller reasonably believes are fake, so long as the criteria for withholding reviews are applied uniformly to all reviews submitted. Neither are sellers required to display reviews that are unrelated to their products or services. Customer service, delivery, returns, and exchanges are related to the seller's products and services.

(iii) Assume now, that each product page starts with a glowing five-star review that is labeled as "the most helpful review." Labeling the review as the most helpful suggests it was voted most helpful by consumers visiting the website. If the initial review on each such page was selected by the retailer and was not selected as the most helpful review by other consumers, labeling it as the most helpful would be deceptive.

(9) *Example 9.* A manufacturer offers to pay genuine purchasers \$20 each to write positive reviews of its products on third-party review websites. Such reviews are deceptive even if the payment is disclosed because their positive nature is required by,

rather than being merely influenced by, the payment. If, however, the manufacturer did not require the reviews to be positive and the reviewers understood that there were no negative consequences from writing negative reviews, a clear and conspicuous disclosure of the material connection would be appropriate (*see* § 255.5 and § 255.6 (f)(2) (Example 6)).

(10) *Example 10.* A manufacturer threatens consumers who post negative reviews of its products to third-party review websites with legal action or with physical threats in order to coerce the consumers to delete their reviews. Such threats amount to an unfair practice because consumers would be misled as to purchasers' actual opinions of the product.<sup>2</sup>

(11) *Example 11.* A marketer contacts recent online, mail-order, and in-store purchasers of its products and asks them to provide feedback to the marketer. The marketer then invites purchasers who give very positive feedback to post online reviews of the products on third-party websites. Less pleased and unhappy purchasers are simply thanked for their feedback. Such a practice may be an unfair or deceptive practice if it results in the posted reviews being substantially more positive than if the marketer had not engaged in the practice. If, in the alternative, the marketer had simply invited all recent purchasers to provide feedback on third-party websites, the solicitation would not have been unfair or deceptive, even if it had expressed its hope for positive reviews.

### **§ 255.3 Expert endorsements.**

(a) Whenever an advertisement represents, expressly or by implication, that the endorser is an expert with respect to the endorsement message, then the endorser's

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<sup>2</sup> The Consumer Review Fairness Act makes it illegal for companies to include standardized contract provisions that threaten or penalize people for posting honest reviews. 15 U.S.C. 45b.

qualifications must in fact give the endorser the expertise that the endorser is represented as possessing with respect to the endorsement.

(b) Although an expert may, in endorsing a product, take into account factors not within the endorser's expertise (such as taste or price), the endorsement must be supported by an actual exercise of that expertise in evaluating product features or characteristics with respect to which the endorser has expertise and which are relevant to an ordinary consumer's use of or experience with the product. This evaluation must have included an examination or testing of the product at least as extensive as someone with the same degree of expertise would normally need to conduct in order to support the conclusions presented in the endorsement. To the extent that the advertisement implies that the endorsement was based upon a comparison to another product or other products, such comparison must have been included in the expert's evaluation; and as a result of such comparison, the expert must have concluded that, with respect to those features on which the endorser is expert and which are relevant and available to an ordinary consumer, the endorsed product is at least equal overall to the competitors' products. Moreover, where the net impression created by the endorsement is that the advertised product is superior to other products with respect to any such feature or features, then the expert must in fact have found such superiority (*see* § 255.1(e) regarding the liability of endorsers).

(c) Examples:

(1) *Example 1.* An endorsement of a particular automobile by one described as an "engineer" implies that the endorser's professional training and experience are such that the endorser is well acquainted with the design and performance of automobiles. If the endorser's field is, for example, chemical engineering, the endorsement would be deceptive.

(2) *Example 2.* An endorser of a hearing aid is simply referred to as “Doctor” during the course of an advertisement. The ad likely implies that the endorser is a medical doctor with substantial experience in the area of hearing. If the endorser is not a medical doctor with substantial experience in audiology, the endorsement would likely be deceptive. A non-medical “doctor” (e.g., an individual with a Ph.D. in audiology) or a physician without substantial experience in the area of hearing might be able to endorse the product, but at minimum, the advertisement must clearly and conspicuously disclose the nature and limits of the endorser’s expertise

(3) *Example 3.* A manufacturer of automobile parts advertises that its products are approved by the “American Institute of Science.” From its name, consumers would infer that the “American Institute of Science” is a bona fide independent testing organization with expertise in judging automobile parts and that, as such, it would not approve any automobile part without first testing its efficacy by means of valid scientific methods. If the American Institute of Science is not such a bona fide independent testing organization (e.g., if it was established and operated by an automotive parts manufacturer), the endorsement would be deceptive. Even if the American Institute of Science is an independent bona fide expert testing organization, the endorsement may nevertheless be deceptive unless the Institute has conducted valid scientific tests of the advertised products and the test results support the endorsement message.

(4) *Example 4.* A manufacturer of a non-prescription drug product represents that its product has been selected over competing products by a large metropolitan hospital. The hospital has selected the product because the manufacturer, unlike its competitors, has packaged each dose of the product separately. This package form is not generally available to the public. Under the circumstances, the endorsement would be deceptive because the basis for the hospital’s choice – convenience of packaging – is neither

relevant nor available to consumers, and the basis for the hospital's decision is not disclosed to consumers.

(5) *Example 5.* A person who is identified as the president of a commercial "home cleaning service" states in a television advertisement that the service uses a particular brand of cleanser, instead of leading competitors it has tried, because of this brand's performance. Because cleaning services extensively use cleansers in the course of their business, the ad likely conveys that the president has knowledge superior to that of ordinary consumers. Accordingly, the president's statement will be deemed to be an expert endorsement. The service must, of course, actually use the endorsed cleanser. In addition, because the advertisement implies that the cleaning service has experience with a reasonable number of leading competitors' brands available to consumers, the service must, in fact, have such experience, and have determined, based on its expertise, that the endorsed product's cleaning ability is at least equal (or superior, if such is the net impression conveyed by the advertisement) to that of the leading competitors' products available to consumers. Because in this example the cleaning service's president makes no mention that the endorsed cleanser was "chosen," "selected," or otherwise evaluated in side-by-side comparisons against its competitors, it is sufficient if the service has relied solely upon its accumulated experience in evaluating cleansers without having performed side-by-side or scientific comparisons.

(6) *Example 6.* A medical doctor states in an advertisement for a drug that the product will safely allow consumers to lower their cholesterol by 50 points. If the materials the doctor reviewed were merely letters from satisfied consumers or the results of a rodent study, the endorsement would likely be deceptive because those materials are not the type of scientific evidence that others with the purported degree of expertise would consider adequate to support this conclusion about the product's safety and

efficacy. Under such circumstances, both the advertiser and the doctor would be liable for the doctor's misleading representation (*See* § 255.1(d) and (e)).

#### **§ 255.4 Endorsements by organizations.**

Endorsements by organizations, especially expert ones, are viewed as representing the judgment of a group whose collective experience exceeds that of any individual member, and whose judgments are generally free of the sort of subjective factors that vary from individual to individual. Therefore, an organization's endorsement must be reached by a process sufficient to ensure that the endorsement fairly reflects the collective judgment of the organization. Moreover, if an organization is represented as being expert, then, in conjunction with a proper exercise of its expertise in evaluating the product under § 255.3, it must utilize an expert or experts recognized as such by the organization or standards previously adopted by the organization and suitable for judging the relevant merits of such products (*see* § 255.1(e) regarding the liability of endorsers).

(a) *Example 1.* A mattress manufacturer advertises that its product is endorsed by a chiropractic association. Because the association would be regarded as expert with respect to judging mattresses, its endorsement must be supported by an evaluation by an expert or experts recognized as such by the organization, or by compliance with standards previously adopted by the organization and aimed at measuring the performance of mattresses in general and not designed with the unique features of the advertised mattress in mind.

(b) *Example 2.* A trampoline manufacturer sets up and operates what appears to be an independent trampoline review website. The site reviews the manufacturer's trampolines, as well as those of competing manufacturers. Because the website falsely appears to be independent, it is deceptive (*see* § 255.5).

(c) *Example 3.* Assume that a third party operates a wireless headphone review website that provides rankings of different manufacturers' wireless headphones from most recommended to least recommended. The website operator accepts money from manufacturers in exchange for higher rankings of their products. Regardless of whether the website makes express claims of objectivity or independence, such paid-for rankings are deceptive. A headphone manufacturer who pays for a higher ranking on the website may also be held liable for the deception. A disclosure that the website operator receives payments from headphone manufacturers would be inadequate because the payments actually determine the headphones' relative rankings. If, however, the review website does not take payments for higher rankings, but receives payments from some of the headphone manufacturers, such as for affiliate link referrals, it should clearly and conspicuously disclose that it receives such payments (*see* § 255.5(k)(11)).

#### **§ 255.5 Disclosure of material connections.**

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement and that connection is not reasonably expected by the audience, such connection must be disclosed clearly and conspicuously. Material connections can include a business, family, or personal relationship. They can include monetary payment or the provision of free or discounted products or services (including products or services unrelated to the endorsed product) to an endorser, regardless of whether the advertiser requires an endorsement in return. Material connections can also include other benefits to the endorser, such as early access to a product or the possibility of being paid, of winning a prize, or of appearing on television or in other media promotions. Some connections may be immaterial because they are too insignificant to affect the weight or credibility given to endorsements. Material connections do not need to be disclosed when they are

understood or expected by all but an insignificant portion of the audience for an endorsement. A disclosure of a material connection does not require the complete details of the connection, but it must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance. Additional guidance is provided by the examples in paragraphs (a) through (l) of this section.

(a) *Example 1.* A drug company commissions research on its product by an outside organization. The drug company determines the overall subject of the research (e.g., to test the efficacy of a newly developed product) and pays a substantial share of the expenses of the research project, but the research organization determines the protocol for the study and is responsible for conducting it. A subsequent advertisement by the drug company mentions the research results as the “findings” of that research organization. Although the design and conduct of the research project are controlled by the outside research organization, the weight consumers place on the reported results could be materially affected by knowing that the advertiser had funded the project. Therefore, the advertiser’s payment of expenses to the research organization should be disclosed in the advertisement.

(b) *Example 2.* A film star endorses a particular food product in a television commercial. The endorsement regards only points of taste and individual preference. This endorsement must, of course, comply with § 255.1; but, regardless of whether the star’s compensation for the commercial is a \$1 million cash payment or a royalty for each product sold by the advertiser during the next year, no disclosure is required because such payments likely are ordinarily expected by viewers.

(c) *Example 3.* (1) During an appearance by a well-known professional tennis player on a television talk show, the host comments that the past few months have been the best of the player’s career and during this time the player has risen to their highest level ever in the rankings. The player responds by attributing that improvement to seeing



the ball better, ever since having laser vision correction surgery at a specific identified clinic. The athlete continues talking about the ease of the procedure, the kindness of the clinic's doctors, the short recovery time, and now being able to engage in a variety of activities without glasses, including driving at night. The athlete does not disclose having a contractual relationship with the clinic that includes payment for speaking publicly about the surgery. Consumers might not realize that a celebrity discussing a medical procedure in a television interview has been paid for doing so, and knowledge of such payments would likely affect the weight or credibility consumers give to the celebrity's endorsement. Without a clear and conspicuous disclosure during the interview that the athlete has been engaged as a spokesperson for the clinic, this endorsement is likely to be deceptive. A disclosure during the show's closing credits would not be clear and conspicuous. Furthermore, if consumers are likely to take away from the interview that the athlete's experience is typical of those who undergo the same procedure at the clinic, the advertiser must have substantiation for that claim.

(2) Assume that the tennis player also touts the results of the surgery – mentioning the clinic by name – in a social media post. Consumers might not realize that the athlete is a paid endorser and, because that information might affect the weight consumers give to the tennis player's endorsement, the relationship with the clinic should be disclosed – regardless of whether it paid the athlete for that particular post. It should be disclosed even if the relationship involves no payments but only the tennis player getting the laser correction surgery for free or at a reduced cost.

(3) Assume that the clinic uses the tennis player's endorsement in its own social media posts. The clinic should clearly and conspicuously disclose its relationship to the athlete in its posts.

(4) Assume that during the appearance on the television talk show, the tennis player is wearing clothes bearing the insignia of an athletic wear company with which the

athlete also has an endorsement contract. Although this contract requires wearing the company's clothes not only on the court but also in public appearances, when possible, the athlete does not mention the clothes or the company during the appearance on the show. No disclosure is required because no representation is being made about the clothes in this context.

(d) *Example 4.* (1) A television ad for an anti-snoring product features a physician who says, "I have seen dozens of products come on the market over the years and, in my opinion, this is the best ever." Consumers would expect the physician to be reasonably compensated for appearing in the ad. Consumers are unlikely, however, to expect that an expert endorser like the physician receives a percentage of gross product sales or owns part of the company, and either of these facts would likely materially affect the credibility that consumers attach to the endorsement. Accordingly, the advertisement should clearly and conspicuously disclose such a connection between the company and the physician.

(2) Assume that the physician is also paid to post about the product on social media, a context in which consumers might not expect that the physician was compensated and more likely to expect that the physician is expressing an independent, professional opinion. Accordingly, the post should clearly and conspicuously disclose the doctor's connection with the company.

(e) *Example 5.* (1) In a television advertisement, an actual patron of a restaurant, who is neither known to the public nor presented as an expert, is shown seated at the counter. The diner is asked for a "spontaneous" opinion of a new food product served in the restaurant. Assume, first, that the advertiser had posted a sign on the door of the restaurant informing all who entered that day that patrons would be interviewed by the advertiser as part of its television promotion of its new "meat-alternative" burger. A patron seeing such a sign might be more inclined to give a positive review of that item in order to appear on television. The advertisement should thus clearly and conspicuously

inform viewers that the patrons on screen knew in advance that they might appear in a television advertisement if they gave the burger a good review because that information may materially affect the weight or credibility of the endorsement.

(2) Assume, in the alternative, that the advertiser had not posted the sign and that patrons asked for their opinions about the burger did not know or have reason to believe until after their response that they were being recorded for use in an advertisement. No disclosure is required here, even if patrons were also told, after the interview, that they would be paid for allowing the use of their opinions in advertising.

(f) *Example 6.* (1) An infomercial producer wants to include consumer endorsements in an infomercial for an automotive additive product not yet on the market. The producer's staff selects several people who work as "extras" in commercials and asks them to use the product and report back, telling them that they will be paid a small amount if selected to endorse the product in the infomercial. Viewers would not expect that these "consumer endorsers" are actors who used the product in the hope of appearing in the commercial and receiving compensation. Because the advertisement fails to disclose these facts, it is deceptive.

(2) Assume that the additive's marketer wants to have more consumer reviews appear on its retail website which sells a variety of its automotive products. The marketer recruits ordinary consumers to get a free product (*e.g.*, a set of jumper cables or a portable air compressor for car tires) and a \$30 payment in exchange for posting a consumer review of the free product on the marketer's website. The marketer makes clear and the reviewers understand that they are free to write negative reviews and that there are no negative consequences of doing so. Any resulting review that fails to clearly and conspicuously disclose the incentives provided to that reviewer is likely deceptive (When the resulting reviews must be positive or reviewers believe they might face negative consequences from posting negative reviews, a disclosure would be insufficient, see §

255.2(d) and (e)(9)). Even if adequate disclosures appear in each incentivized review, the practice could still be deceptive if the solicited reviews contain star ratings that are included in an average star rating for the product and including the incentivized reviews materially increases that average star rating.

(g) *Example 7.* A woodworking influencer posts on-demand videos of various projects. A tool manufacturer sends the influencer an expensive full-size lathe in the hope that the influencer would post about it. The woodworker uses the lathe for several products and comments favorably about it in videos. If a significant proportion of viewers are likely unaware that the influencer received the lathe free of charge, the woodworker should clearly and conspicuously disclose receiving it for free, a fact that could affect the credibility that viewers attach to the endorsements. The manufacturer should advise the woodworker at the time it provides the lathe that this connection should be disclosed, and it should have reasonable procedures in place to monitor the influencer's postings for compliance and follow those procedures (*see* § 255.1(d)).

(h) *Example 8.* An online community has a section dedicated to discussions of robotic products. Community members ask and answer questions and otherwise exchange information and opinions about robotic products and developments. Unbeknownst to this community, an employee of a leading home robot manufacturer has been posting messages on the discussion board promoting the manufacturer's new product. Knowledge of this poster's employment likely would affect the weight or credibility of the endorsements. Therefore, the poster should clearly and conspicuously disclose their relationship to the manufacturer to community members. To limit its own liability for such posts, the employer should be engaged in appropriate training of employees. To the extent that the employer has directed such endorsements or otherwise has reason to know about them, it should also be monitoring them and taking other steps to ensure

compliance (*see* § 255.1(d)). The disclosure requirements in this example would apply equally to consumer reviews of the product posted on retail websites or review platforms.

(i) *Example 9.* A college student signs up to be part of a program in which points are awarded each time a participant posts on social media about a particular advertiser's products. Participants can then exchange their points for prizes, such as concert tickets or electronics. These incentives would materially affect the weight or credibility of the college student's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.

(j) *Example 10.* Great Paper Company sells photocopy paper with packaging that has a seal of approval from the No Chlorine Products Association, a non-profit third-party association. Great Paper Company paid the No Chlorine Products Association a reasonable fee for the evaluation of its product and its manufacturing process. Consumers would reasonably expect that marketers have to pay for this kind of certification. Therefore, there is no unexpected material connection between the company and the association, and the use of the seal without disclosure of the fee paid to the association would not be deceptive.

(k) *Example 11.* A coffee lover creates a blog that reviews coffee makers. The blogger writes the content independently of the marketers of the coffee makers, but includes affiliate links to websites on which consumers can buy these products from their marketers. Whenever a consumer clicks on such a link and buys the product, the blogger receives a small portion of the sale. Because knowledge of this compensation could affect the weight or credibility site visitors give to the blogger's reviews, the reviews should clearly and conspicuously disclose the compensation.

(l) *Example 12.* (1) Near the beginning of a podcast, the host reads what is obviously a commercial for a product. Even without a statement identifying the advertiser as a sponsor, listeners would likely still expect that the podcaster was compensated, so

there is no need for a disclosure of payment for the commercial. Depending upon the language of the commercial, however, the audience may believe that the host is expressing their own views in the commercial, in which case the host would need to hold the views expressed (*see* § 255.0(b)).

(2) Assume that the host also mentions the product in a social media post. The fact that the host did not have to make a disclosure in the podcast has no bearing on whether there has to be a disclosure in the social media post.

### **§ 255.6 Endorsements directed to children.**

Endorsements in advertisements addressed to children may be of special concern because of the character of the audience. Practices which would not ordinarily be questioned in advertisements addressed to adults might be questioned in such cases.

By direction of the Commission.

**April J. Tabor,**

*Secretary.*

Note: The following statement will not appear in the Code of Federal Regulations:

**Statement of Chair Lina M. Khan**

**Regarding the Endorsement Guides Review**

**May 19, 2022**

Today, the Commission is voting on releasing proposed revised “Guides Concerning Use of Endorsements and Testimonials in Advertising” and publishing a Notice seeking comment on them (“Revised Guides”). These Guides tell companies how to use endorsements, testimonials, influencers, and consumer reviews in ads without deceiving consumers.

These revisions come at a time when influencer marketing is becoming

increasingly prevalent and as consumers increasingly rely on online consumer reviews to decide what to buy. Reports indicate that the global influencer marketing industry is set to grow to approximately \$16.4 billion in 2022.<sup>1</sup> Indeed, more than 75% of brand marketers intend to dedicate a budget to influencer marketing in 2022.<sup>2</sup> Influencers who are paid, receive free product or services, or have a relationship with a brand sometimes fail to disclose that material connection, hoping to appear more authentic to consumers. Consumers' increasing reliance on online reviews can also incentivize advertisers to harness fake reviews, suppress negative reviews, and amplify positive ones.

I want to highlight three novel aspects of these Revised Guides that strike me as especially important.

First is the Revised Guides' guidance on platforms' relationships with influencer marketing. Digital platforms profit from influencer marketing and should bear greater responsibility in this area.<sup>3</sup> The Revised Guides warn that some platforms' disclosure tools are inadequate and may expose influencers to liability or, in some instances, leave platforms themselves open to liability.

Second is the Revised Guides' explicit guidance on consumer reviews, and specifically the discussion of how encouraging fake reviews and suppressing negative reviews can result in law violations. This guidance reflects recent enforcement actions the agency has taken—including a recent final order settling allegations that Fashion Nova blocked negative reviews of its products from being posted on its website.<sup>4</sup>

Third is the Revised Guides' warning that child-directed influencer advertising is

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<sup>1</sup> Werner Geyser, *The State of Influencer Marketing 2022: Benchmark Report*, INFLUENCER MKTG. HUB (Mar. 2, 2022), <https://influencermarketinghub.com/influencer-marketing-benchmark-report/>.

<sup>2</sup> *Id.* In addition, the global number of influencer marketing related service offerings grew by 26% in 2021 alone, reaching 18,900 firms offering or specializing in influencer marketing services.

<sup>3</sup> Ellen Simon, *How Instagram Makes Money*, INVESTOPEDIA (March 17, 2022), <https://www.investopedia.com/articles/personal-finance/030915/how-instagram-makes-money.asp> (noting that, in 2019, Instagram generated \$20 billion in advertising revenue and that 69% of America's marketers planned to spend most of their 2020 influencer budget on Instagram).

<sup>4</sup> Decision and Order, *In re Fashion Nova, LLC*, No. C-4759 (F.T.C. 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/1923138C4759FashionNovaOrder\\_0.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/1923138C4759FashionNovaOrder_0.pdf).

of special concern to the Commission. Those who market to children cannot assume that compliance with these guides is a safe harbor.

The kid influencer marketplace is estimated to be as large as \$1.7 billion and is rapidly growing.<sup>5</sup> This type of child-directed influencer advertising can pose a host of risks. As one recent report noted, “unless children are able to differentiate between advertising and other forms of entertainment, and grasp the persuasive intent of advertising, then they are at risk of deception. This is especially true for children under 12, whose advertising literacy—all knowledge and skills related to understanding advertising—has not yet fully developed.”<sup>6</sup>

There is currently no clear or consistent approach to addressing the problem, and Congress and advocacy groups have called on the FTC to provide guidance on this issue.<sup>7</sup> While we presently lack the full evidentiary record to support specific guidance or to propose best practices, I am eager for more input that will support more concrete action in this important area. Accordingly, in tandem with issuing the Revised Guides today, we are announcing an event to gather information on stealth advertising targeting children. The public event will be held in October and will focus on the blurring of advertising and programming content in child-directed digital media.

I am eager for robust participation at this event and will look forward to learning from the public as we consider how to move forward on this important and timely issue.

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<sup>5</sup> Agnieszka Guttman, *Kids Advertising Spending Worldwide 2012-2021, By Format*, STATISTA (April 7, 2020), <https://www.statista.com/statistics/750865/kids-advertising-spending-worldwide/>.

<sup>6</sup> Miriam Rahali & Sonia Livingstone, #SPONSOREDADS: MONITORING INFLUENCER MARKETING TO YOUNG AUDIENCES 8 (2002), [http://eprints.lse.ac.uk/113644/7/Sponsoredads\\_policy\\_brief.pdf](http://eprints.lse.ac.uk/113644/7/Sponsoredads_policy_brief.pdf).

<sup>7</sup> See, e.g., Letter from Rep. Eshoo, Rep. Castor & Sen. Markey to Joseph J. Simons, Chair, Fed. Trade Comm’n (Aug. 22, 2019), [https://eshoo.house.gov/sites/eshoo.house.gov/files/wysiwyg\\_uploaded/Eshoo-Markey-Castor%20follow%20up%20letter%20to%20FTC%20re%20predatory%20online%20ads%20%28002%29.pdf](https://eshoo.house.gov/sites/eshoo.house.gov/files/wysiwyg_uploaded/Eshoo-Markey-Castor%20follow%20up%20letter%20to%20FTC%20re%20predatory%20online%20ads%20%28002%29.pdf); Letter from Sen. Blumenthal, Sen. Markey, and Rep. Eshoo to Joseph J. Simons, Chair, Fed. Trade Comm’n (Dec. 6, 2019), <https://www.blumenthal.senate.gov/imo/media/doc/2019.12.06%20-%20FTC%20-%20Child%20Influencers.pdf>; Letter from Laura Smith, Legal Director, Truth in Advertising, Inc. & Bonnie Patten, Executive Director, Truth in Advertising, Inc. to Andrew Smith, Director, Bureau of Consumer Prot., Fed. Trade Comm’n & Mary Engle, Associate Director, Div. of Advertising Pracs., Fed. Trade Comm’n (Aug. 28, 2019), [https://truthinadvertising.org/wp-content/uploads/2019/08/8\\_28\\_19-ltr-to-FTC-re-Ryan-ToysReview\\_Redacted.pdf](https://truthinadvertising.org/wp-content/uploads/2019/08/8_28_19-ltr-to-FTC-re-Ryan-ToysReview_Redacted.pdf).



